Monark Boat Company *and* UBC, Southern Council of Industrial Workers, United Brotherhood of Carpenters and Joiners of America, AFL-CIO. Case 26-CA-8921

March 4, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on March 2, 1981, by UBC, Southern Council of Industrial Workers, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein called the Union, and duly served on Monark Boat Company, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 26, issued a complaint on March 18, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on December 23, 1980, following a Board election in Case 26-RC-6249,[1] the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate; and that, commencing on or about December 31, 1980, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On March 27, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On June 19, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on June 25, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a brief in opposition to the Motion for Summary Judgment and a Counter-Motion for Summary Judgment.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, Respondent denies several material allegations in the complaint and asserts as affirmative defenses 16 separate alleged procedural infirmities in the complaint. In addition, in its brief in opposition to the General Counsel's Motion for Summary Judgment, Respondent contends that the motion should not be granted because, *inter alia*: (1) Respondent is entitled to a hearing to present evidence material to the issues decided in the underlying representation proceeding; (2) the Acting Regional Director failed to forward the entire record to the Board when Respondent made its request for review, omitting Respondent's attachment to its objections as well as the affidavits of employees taken by Board agents in the underlying representation matter; (3) affidavits of witnesses to a hearing held in Case 26-CA-8688, *et al.*, constitute newly discovered evidence relevant to Respondent's objections in Case 26-RC-6249; (4) violence by union adherents and officials require that a hearing be held to determine whether the certification should be revoked; and (5) Respondent's correspondence with the Union and the Federal Mediation and Conciliation Service demonstrates that it is not refusing to bargain.

Our review of the record herein, including the record in Case 26-RC-6249, discloses that pursuant to a Decision and Direction of Election, an election was conducted on October 7, 1981. The tally of ballots furnished the parties after the election showed 77 votes cast for and 57 against the Union; there were 18 challenged ballots and 1 void ballot. Thereafter, Respondent timely filed objections to conduct affecting the election and, on December 23, 1980, after a complete investigation, the Acting Regional Director for Region 26 issued a Supplemental Decision and Certification of Representative in which he overruled all of Respondent's objections and certified the Union.

By letter dated December 31, 1980, the Union requested Respondent to meet with it for the purpose of collective bargaining. Respondent did not respond to this request. On January 16, 1981, Respondent timely filed a request for review of the Acting Regional Director's Supplemental Decision and Certification of Representative in which it es-

[1] Official notice is taken of the record in the representation proceeding, Case 26-RC-6249, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

sentially reiterated the allegations set forth in the objections. In a March 5, 1981, letter responding to the Region's request for a statement of position with respect to the changes made herein, Respondent stated that it was not required to bargain with the Union until its request for review, then pending before the Board, had been denied. On April 27, 1981, the Board issued an order denying Respondent's request for review of the Acting Regional Director's Supplemental Decision and Certification of Representative.

Based on the record and well-settled Board precedent, we find no merit to any of the numerous contentions made by Respondent in its answer to the complaint and in its opposition to the Motion for Summary Judgment. We find that the General Counsel has correctly appraised Respondent's contentions generally as an attempt to relitigate issues already determined in the underlying representation case and that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.

As noted above, Respondent has since December 31, 1980, refused the Union's request to meet with it for the purpose of collective bargaining. We find no merit in Respondent's contention that it had no obligation to bargain pending disposition of its request for review of the Acting Regional Director's supplemental decision. A pending request for review stays neither a certification nor the resulting obligation to bargain.[2] In addition, we find no issue raised by Respondent's denial of knowledge of the Union's December 31, 1980, letter requesting bargaining. Attached as exhibits to the General Counsel's Motion for Summary Judgment are copies of the Union's letter and a receipt of service by certified mail. These exhibits stand uncontroverted and suffice to establish Respondent's receipt of the Union's request. Furthermore, we reject Respondent's contention that copies of correspondence attached to its opposition to the Motion for Summary Judgment establish that Respondent has not refused to bargain as alleged. Viewed in a light most favorable to Respondent, the correspondence manifests only Respondent's willingness to negotiate a settlement of unfair labor practice charges filed against it by the Union. There is no evidence of collective bargaining concerning wages and working conditions of unit employees represented by the Union.

We also find that Respondent has failed to demonstrate the need for a hearing. It is well settled that a party is not entitled to a hearing in either a representation[3] or unfair labor practice[4] proceeding, absent a showing of substantial and material issues. In denying Respondent's request for review, the Board affirmed the Acting Regional Director's finding that there was no substantial or material issue warranting a hearing in the underlying representation case. Further, the evidence which Respondent offers in its opposition to the Motion for Summary Judgment does not now raise any substantial or material issue. Respondent has failed to show that the evidence contained in affidavits obtained in a later unfair labor practice proceeding was previously unavailable and, therefore, it is not entitled to have the record reopened.[5] Respondent's offer of proof of alleged post-election incidents of violence likewise does not raise a substantial or material issue concerning the validity of the Union's certification.

Finally, we find no merit to Respondent's contention that the Motion for Summary Judgment should be denied because subsequent to its post-election request for review the Acting Regional Director did not transmit to the Board both Respondent's attachments to its objections and the affidavits of employees given to Board agents. Respondent admits that it transmitted its objections and attachments to the Board as part of its request for review. In addition, we find no error in the Acting Regional Director's failure to transmit the affidavits received by Board agents to the Board. It is no abuse of the Board's discretion to deny a request for review without consideration of the affidavits obtained by the Regional Director in his investigation of objections where it appears from the Regional Director's decision and the request for review, as it does here, that no substantial and material issues of fact exist. *Johnson Rents, Inc.*, 253 NLRB 690, 691 (1980).[6] Moreover, this is in conformity with Section 102.69(g)(ii) of the National Labor Relations Board Rules and Regulations, Series 8, as amended September 9, 1981.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[7]

[2] See National Labor Relations Board Rules and Regulations, Series 8, as amended, Sec. 102.67(b).

[3] *National Beryllia Corporation*, 222 NLRB 1289 (1976).

[4] *Handy Hardware Wholesale*, 222 NLRB 373, 374 (1976), enfd. 542 F.2d 935 (5th Cir. 1976), and cases cited therein.

[5] National Labor Relations Board Rules and Regulations, Series 8, as amended, Sec. 102.65(e)(1).

[6] See also, e.g., *Revco D.S., Inc., and/or White Cross Stores, Inc., No. 14 v. N.L.R.B.*, 653 F.2d 264 (6th Cir. 1981).

[7] See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.[8]

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a corporation with an office and place of business in Monticello, Arkansas, is engaged in the manufacture of boats. During the 12 months preceding issuance of the complaint herein, Respondent, in the course and conduct of its business operations, sold and shipped from its Monticello, Arkansas, facility products, goods, and materials valued in excess of $50,000 directly to points outside the State of Arkansas. During the same representative period, Respondent, in the course and conduct of its business operations, purchased and received at its Monticello, Arkansas, facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of Arkansas.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

UBC, Southern Council of Industrial Workers, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees, yard crew employees, supply area employees and truck drivers employed by the Respondent at its three boat facilities located on Patton Street and Conley Street in Monticello, Arkansas, excluding all supervisors, office clericals and guards as defined in the Act.

2. The certification

On October 7, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 26, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on December 23, 1980, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about December 31, 1980, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about December 31, 1980, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since December 31, 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Monark Boat Company set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

[8] We therefore deny Respondent's Cross-Motion for Summary Judgment and its motions that the complaint be dismissed and the Union's certification revoked.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Monark Boat Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. UBC, Southern Council of Industrial Workers, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees, yard crew employees, supply area employees and truck drivers employed by Respondent at its three boat facilities located on Patton Street and Conley Street in Monticello, Arkansas, excluding all supervisors, office clericals and guards as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since December 23, 1980, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about December 31, 1980, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Monark Boat Company, Monticello, Arkansas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with UBC, Southern Council of Industrial Workers, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees, yard crew employees, supply area employees and truck drivers employed by the Respondent at its three boat facilities located on Patton Street and Conley Street in Monticello, Arkansas, excluding all supervisors, office clericals and guards as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its three Patton Street and Conley Street boat facilities in Monticello, Arkansas, copies of the attached notice marked "Appendix."[9]

[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Copies of said notice, on forms provided by the Regional Director for Region 26, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with UBC, Southern Council of Industrial Workers, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees, yard crew employees, supply area employees and truck drivers employed by the Employer at its three boat facilities located on Patton Street and Conley Street in Monticello, Arkansas, excluding all supervisors, office clericals and guards as defined in the Act.

MONARK BOAT COMPANY